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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 361

GOLD FUEL SERVICE, INC., a Corporation of the State of New Jersey,

Plaintiff-Petitioner,

vs.

ESSO STANDARD OIL COMPANY, a Corporation of the State of Delaware,

Defendant-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

REPLY BRIEF FOR PETITIONER.

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SAM WEISS
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[illegible]

Esso's brief (p. 4) in opposition to the petition for writ of certiorari states:

> "Although the petition attempts to supply confusion as to the proper delivered price of the oil as of December 16, 1958, the date when Esso commenced delivery (P6, 7), the delivered price at that time under Esso's proposal was 11 cents per gallon. This consisted of the original delivered price of 10.2 cents plus the November 21st increase of .5 cents and the December 16th increase of .3 cents."

The petition does not attempt to supply any confusion as to Esso's *bid* price of 10.2 per gallon, delivered. None of Esso's affidavits fixes precisely the date on which its 10.2 bid was accepted. *If* Esso's bid had been accepted prior to November 24, 1958, when the posted price for No. 2 oil rose from 9.9 to 10.4 (R79a to 83a), then the bid to the plaintiff's customers would have been based upon the posted price of 9.9 (plus .15 to a consumer—see footnotes in Journal of Commerce issues), to which was added a reduced delivery charge of .15 (reduced from Esso's original delivery-price addition of .33, which, according to one of Esso's own affiants, was the *normal* haulage charge—R13a-17), totaling 10.2. But this Court will scan Esso's affidavits in vain for any words which definitely fix the date of the acceptance of Esso's bid as being prior to November 24, 1958. The papers supporting a motion for summary judgment are required to be closely scrutinized; those opposed to it indulgently treated. Doubts must be resolved in favor of the conventional trial. *West Side Trust Co. v. Gioscigno*, 39 N. J. Super. 467, 470 (A. D. 1956, per Francis, *J. A. D.*). Upon such scrutiny and resolution, Esso's affidavits must be held not to have overcome paragraphs 7 and 8 of the first count of the amended complaint (R8a-8

to 22), to the effect that Esso's 10.2 price was below the rate at which the plaintiff could purchase fuel oil from any of the suppliers in the industry, i.e., at the current posted price of 10.4, after November 24, 1958. (On December 16, 1958, the posted price started going up from 10.4 to 10.7, R67a to 73a.)

The only proposals of Esso that were set forth in its affidavits were the 10.38 bid that was rejected and the 10.2 bid that was accepted. There is nothing in any of its affidavits to show that the 10.2 *accepted* bid was subject to increase, on increase of posted prices.

2.

Esso's brief (p. 5) further states:

> "* * * Gold has never contradicted the assertion that it was unable to compete, not only with Esso, but with other bidders for the job."

Such contradiction was unnecessary. Gold has no cause of action against any competitor whose bid price was not illegal, i.e., not at a figure below the posted price to purchasers for resale. Esso's bid was below such posted price, so far as its affidavits on the motion revealed.

3.

Esso's brief (p. 5) further states:

> "* * * Significantly (Gold) does not refute the statement that any consumer could have purchased fuel oil in the quantities in question at the price noted, and the very issues of the 'Journal of Commerce' upon which Gold relies (R43a-87a) show a lower price to a reseller than a consumer (R29a)."

It is true that the journal issues do show invariably a lower posted price to a reseller than a consumer—.15 lower. However, Esso's bid of 10.2 was .35, not .15, lower than the November 24 consumers' posted price of 10.55, i.e., 10.4 plus .15. No reseller, after November 24, could have purchased at 10.2, when the posted price was 10.4.

4

Esso's brief (p. 8) further states:

> "It is, therefore, clear that no federal right has ever been asserted by petitioner, but, instead, it has sought relief by means of the New Jersey common law action of trespass on the case (R26a)."

Esso fails to distinguish between right and remedy. By virtue of Title 15, U. S. C., Sec. 2, the plaintiff was given the right not to have any competitor attempt to monopolize a part of interstate commerce, to the plaintiff's injury. By virtue of Title 15, U. S. C., Sec. 13a, the plaintiff was given the right not to have any competitor sell at unreasonably low prices for the purpose of destroying competition or eliminating the plaintiff as a competitor, to the plaintiff's injury. By virtue of Esso's actions counted upon in the amended complaint at bar, a common law cause of action consisting of the remedy of trespass on the case for unfair, i.e., illegal, competition existed by reason of the fact that a duty upon Esso not to do any of the things condemned by Secs. 2 and 13a was imported into such common law cause of action as an element and basis of Esso's liability. The fact that a remedy therefor may or may not exist under the remedial provisions of Title 15 is immaterial, since the action at bar is not for the enforcement of Secs. 2 and 13a, and the jurisdiction of the New Jersey

state courts to afford the common law remedy in question has not, therefore, been impaired or defeated by the federal statutory remedial sections.

Respectfully submitted,

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By MICHAEL J. PAPPAS,
A Member of the Firm.

SAM WEISS,
On the Petition.